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No. 96-188

IN THE

Supreme Court of the United States

October Term, 1996

GENERAL ELECTRIC COMPANY, WESTINGHOUSE ELECTRIC CORPORATION, AND MONSANTO COMPANY,
Petitioners,

v.

ROBERT K. JOINER AND KAREN P. JOINER,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the judgment of the court below was based simply on its holding, reached under *de novo* review, that the district court had applied an erroneous construction of Fed. R. Evid. 702 in rendering its admissibility ruling.

2. Whether, if the abuse-of-discretion review standard is somehow relevant to the judgment below, this Court should grant review in order to ensure that in applying well-accepted standards for abuse-of-discretion review of district court evidentiary findings, precisely the same terminology will be used in every circuit.

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BRIEF FOR RESPONDENTS IN OPPOSITION

The petition in this case rests entirely on two sentences in the decision below that address the abuse-of-discretion standard for contested district court findings of fact. App. 4a. "This Court, however, reviews judgments, not statements in opinions," and for that reason this Court has a "duty to look beyond the broad sweep of the language and determine for [itself] precisely the ground on which the judgment rests." *Black v. Cutter Laboratories*, 351 U.S. 292, 297-98 (1956) (citations omitted). The two sentences seized on by petitioners have, in fact, nothing to do with this case, which was argued and won below on the ground that the district court had committed legal error, reviewable *de novo*, in its construction of Fed. R. Evid. 702.

Even if these two sentences were somehow relevant to the judgment below, there is nothing to petitioners' claim that an important circuit conflict exists over the standard of review for trial court decisions excluding expert testimony. "'[A]buse of discretion' . . . is 'a verbal coat of . . . many colors.'" Hon. Henry J. Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747, 763 (1982) (quoting *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 39 (1952) (Frankfurter, J., dissenting)). All circuits use an abuse-of-discretion standard in reviewing trial court factfinding concerning the admissibility of expert testimony, although slight differences in the terminology used to describe the standard do exist. There is no need for review in this area unless and until a case emerges where it appears that the result would be different if a holding in another circuit were applied. This is not such a case.

STATEMENT OF THE CASE

1. Introduction. This diversity action, arising under Georgia tort law, was instituted by respondent Robert K. Joiner and his wife, respondent Karen P. Joiner (for simplicity, "Joiner"). Beginning in 1973, Joiner worked for the City of Thomasville, Georgia, as an electrician responsible for maintaining and repairing electrical transformers and voltage regulators. App. 2a. For over a decade, in the course of his employment Joiner came into frequent contact with dielectric fluid distributed by petitioners General Electric Company and Westinghouse Electric Corporation.

He frequently breathed it in close quarters and often absorbed it through his skin. App. 2a-3a. It is undisputed that as a result of his workplace exposure to dielectric fluid, Joiner was exposed to polychlorinated biphenyls ("PCBs"), a chemical produced by petitioner Monsanto Company. App. 2a, 35a-37a. The parties disagree on the effects of that exposure. In addition to alleging that the exposure to PCBs itself was a battery under Georgia law, Joiner alleges that the exposure contributed to his development of lung cancer at the unusually early age of 37 and seeks recovery under strict liability, negligence, fraud, and punitive damages theories for petitioners' role in contributing to his injury. App. 39a-40a.

Petitioners denied that exposure to their products injured Joiner in any way. After full discovery on causation issues, during which both sides deposed each other's experts, petitioners filed a motion for summary judgment arguing that Joiner could not prove that their products contributed to his development of lung cancer at an abnormally early age. The motion relied solely on the discovery materials developed at that point in the case; petitioners did not submit with their motion any new expert testimony (by way of affidavit, for example) attacking the testimony of Joiner's experts. Nonetheless, with his summary judgment opposition, Joiner included affidavits from two concededly qualified experts laying out the basis of his claim that petitioners had contributed to the development of his lung cancer. Petitioners made no attempt to impeach the validity of these affidavits with affidavits from their experts. Nor did petitioners move to strike the affidavits, or to exclude the underlying testimony through a motion *in limine*.

2. District Court Holding. Both sides requested oral argument on the issues raised in their papers. The district court did not grant these requests. Nor did it hold an evidentiary hearing to evaluate the live testimony of Joiner's experts regarding their proposed testimony. Instead, the district court granted summary judgment in full and dismissed Joiner's complaint. The district court's grant of summary judgment rested on two separate grounds, one under Fed. R. Civ. P. 56 on the sufficiency of Joiner's evidence, and another under Fed. R. Evid. 702 on the admissibility of his experts' testimony.

On the first ground, the district court held under Rule 56(c) that petitioners had "made a satisfactory showing that there is insufficient evidence to establish that Joiner was exposed to furans or dioxins" (toxic chemicals often present with PCBs). App. 46a. Reviewing the record, the district court then held under Rule 56(e) that Joiner's evidence was "insufficient to allow a jury to determine that Joiner was exposed to furans," App. 49a, and was also insufficient to establish that "Joiner was exposed to dioxins." App. 51a. The district court then used this holding to rule all of Joiner's expert testimony inadmissible, on the premise that the testimony was "inextricably bound up with the experts' assumption that Joiner was exposed to furans and dioxins." App. 53a; *see also* App. 57a (stating that "Plaintiffs' experts assumed Joiner was exposed to furans and dioxins. . . . [A]s discussed above, Plaintiffs have failed to show a genuine dispute over whether furans and dioxins were in the PCBs to which Joiner was exposed.").

As a second ground for summary judgment, the district court ruled all of Joiner's expert testimony inadmissible under Rule 702, focusing explicitly on "the conclusions that Plaintiffs' experts draw from the studies they cite." App. 58a. The district court explained that it was "not persuaded" that these conclusions were anything more than subjective speculation. App. 67a. The district court focused in particular on whether, in its view, some of the specific studies cited by Joiner's experts supported the specific conclusions that they had reached. *See, e.g.*, App. 62a ("Plaintiffs' experts erred in relying on the mice studies to opine that PCBs caused Joiner's lung cancer"); App. 63a (opining that other "studies are either equivocal or not helpful to Plaintiffs"); App. 63a-64a (complaining that only "selected quotes" were used from one study).

3. The Court of Appeals' Decision. On appeal, Joiner did not attack any exercise of the district court's discretion, and discussed none of the district court's criticisms of the specific scientific data involved in this case. Rather, he argued for *de novo* review of both grounds for summary judgment. The court of appeals agreed, conducted *de novo* review, accepted Joiner's legal arguments, and reversed the district court's grant of summary judgment.

On the first ground for summary judgment involving Rule 56, Joiner argued that the district court "erred as a matter of law in ruling the testimony of Joiner's experts inadmissible on the ground that the experts' opinions 'do not fit the facts in this case because the opinions are inextricably bound up with the experts' assumption that Joiner was exposed to furans and dioxins.'" Brief of Plaintiffs-Appellants, filed Jan. 29, 1995 ("Joiner Br."), at 22 (quoting App. 53a). Joiner argued that "[t]he district court cited no evidence in support of its assertion" that this assumption was integral, and that "[n]owhere in their depositions or affidavits did Joiner's experts indicate that their opinions hinged on exposure to furans or dioxin, and that their conclusions would change if nonexposure were proved." *Id.* at 23. On *de novo* review, the Eleventh Circuit agreed and reversed on this ground, noting that each expert had testified that PCBs alone cause cancer, so that it was "immaterial whether there were furans and dioxin in the fluid." App. 14a. In any event, the court held, "a genuine dispute . . . exists over whether furans and dioxins could have been present in the dielectric fluid," App. 14a-15a, reviewing the record evidence on this point *de novo* as it was required to do under Rule 56. *See* App. 15a-16a.

On the second ground for summary judgment involving Rule 702, Joiner's argument was similarly straightforward. After noting that "errors in the construction and application of the Federal Rules of Evidence are reviewed *de novo*," Joiner Br. at 4 (citing *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 163 (1988)), Joiner argued that "[t]he district court's entire analysis of Joiner's expert testimony, *see* Opinion at 21-39 [App. 51a-68a], is based on a misunderstanding of Fed. R. Evid. 702." Joiner Br. at 11. Relying on this Court's statement that the "focus" of analysis under Rule 702, "of course, must be solely on principles and methodology, not on the conclusions that they generate," *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786, 2797 (1993), Joiner argued that by "bas[ing] its inadmissibility ruling on an examination of the experts' particular conclusions," and crediting petitioners' attacks on those conclusions, "the district court's whole analytical framework" was "erroneous as a matter of law." Joiner Br. at 14-16.

The Eleventh Circuit agreed and reversed on this ground also. Summarizing *Daubert*'s construction of Rule 702, the court of appeals emphasized that the only issue under Rule 702 is whether an expert's methodology is scientifically valid. Thus, trial judges must "be careful not to cross the line between deciding whether the expert's testimony is based on 'scientifically valid principles' and deciding upon the correctness of the expert's conclusions." App. 6a (quoting *Daubert*, 113 S. Ct. at 2796). A district court, it held, "is not to weigh or choose between conflicting scientific opinions, or to analyze and study the science in question in order to reach its own scientific conclusions from the material in the field." App. 7a; *see also* App. 11a ("the district court's focus is a narrow one and does not encompass deciding which expert's conclusions are better reasoned or more appealing. Nor should the court make independent scientific judgments on the basis of individual studies.").

After setting out this description of the content of the Rule 702 standard, the court of appeals then held that the district court had committed legal error in failing to apply the standard. It noted that the district court had addressed only half the studies analyzed by Joiner's experts and, relying only on brief and highly critical summaries, had "then accepted defendants' criticisms of the conclusions reached in those studies." App. 13a & n.9 (citing App. 67a). This approach, the court pointed out, was wrong as a matter of law: "As *Daubert* makes clear, the district court may not decide whether an expert's opinions are correct, but merely whether the bases supporting the conclusions are reliable." App. 13a (citation omitted). After reviewing the uncontradicted evidence on the validity of the methodology employed by Joiner's experts, *see* App. 8a-11, and specifically noting that "defendants do not challenge" the fact that the experts' methodology has been generally accepted as valid for centuries, App. 10a-11a, the Eleventh Circuit reversed. It held that the district court had erred as a matter of law under Rule 702 in "exclud[ing] the testimony because it drew different conclusions from the research than did each of the experts"; instead, the district court was obligated to allow "the jury to decide the correctness of competing expert opinions." App. 13a.

REASONS FOR DENYING THE PETITION

The petition should be denied for two independent reasons.

I. THE QUESTION IS NOT PROPERLY PRESENTED BECAUSE THE JUDGMENT BELOW IS BASED ON THE HOLDING, UNDER *DE NOVO* REVIEW, THAT THE DISTRICT COURT APPLIED AN ERRONEOUS CONSTRUCTION OF FED. R. EVID. 702

Certiorari is unwarranted here, first and foremost, because the question raised in the petition, concerning the nature of the standard of review for contested district court factfinding under Rule 702, has nothing to do this case.

The petition rests entirely on two sentences in the court of appeals' decision in which the court set out the abuse-of-discretion standard for review of contested findings of fact. *See* App. 4a. However, petitioners ignore that immediately following these two sentences the court stated that "[t]o the extent that the district court's ruling turns on an interpretation of a Federal Rule of Evidence, our review is plenary." App. 5a. As already explained, this is the only standard of review that turned out to be relevant to the Eleventh Circuit's decision reversing the grant of summary judgment: Joiner's sole Rule 702 argument was that the district court had erred as a matter of law by focusing not on his experts' methodology but, quite explicitly, on their particular conclusions, and the court ruled for Joiner on this basis. See pp. 3-5, *supra*.

Because this Court "reviews judgments, not statements in opinions," *Black v. Cutter Laboratories*, *supra*, 351 U.S. at 297, the fact that the Eleventh Circuit mentioned the abuse-of-discretion review standard for district court factfinding as part of a routine section of its opinion (the kind of general summary that is contained in countless appellate opinions) does not open the way for review. Nowhere do petitioners demonstrate that the abuse-of-discretion review standard had anything to do with the court of appeals' *judgment*. Indeed, petitioners concede that the key holding was "that 'we find that the district court improperly assessed the admissibility of the proffered scientific expert testimony.'" Pet. at 4 (quoting App. 2a) — in other words, that the

district court simply used the wrong approach in assessing the testimony under Rule 702. See pp. 4-5, *supra*. Petitioners' complaint that the court of appeals mentioned "materials not cited by any party in the District Court," Pet. at 4 (citing App. 16a), hardly demonstrates that it was conducting abuse-of-discretion review under Rule 702. Rather, this part of the court of appeals' opinion was merely conducting *de novo* review of whether a genuine issue existed on exposure to furans and dioxin. See p. 4, *supra*.

Nor are petitioners correct that the judges on the panel "disagreed as to the proper standard and nature of appellate review of district court rulings under *Daubert*." Pet. at 3. To the contrary, the concurrence actually reinforced the fact that the judgment below rested on *de novo* review of the district court's error of law in the overly broad scope of its analysis under Rule 702. It emphasized: "The *sufficiency* of the evidence and the *weight* of the evidence . . . are beyond the scope of the *Daubert* analysis. Whether the conclusions advanced from the stated premises in fact follow and the persuasiveness of these conclusions in the ultimate resolution of competing opinions, are questions appropriately left to the finder of fact." App. 16a-17a.

The dissent further confirmed that the judgment below rested on *de novo* review of the legal standard applied by the district court. The dissent simply disagreed with the majority's construction of Rule 702 and argued that the district court's construction was correct. *See* App. 21a ("the majority errs by first applying the reliability prong of *Daubert* to the experts' opinions as a whole, and then applying the relevancy prong."); App. 30a ("I caution against using the majority's approach that applies each *Daubert* prong to the testimony at a whole. I would approve the trial court's step-by-step approach"). This analysis of the proper construction Rule 702 has nothing to do with the standard of review for contested factual findings.

Of course, the dissent did address the standard-of-review topic, but only as an aside, to offer "a more precise explanation of the standard of review," App. 18a, by providing "clear guidance" with "terminology that is firmly established in the jurisprudence of this and other circuits." App. 19a. *See* App. 19a-21a & n.1. Moreover,

far from disagreeing with the majority's boilerplate statement on the standard of review, the dissent endorsed that analysis (albeit with minor suggestions for appropriate terminology). The dissent noted that whether the district court "properly applied Rule 702. . . is a question of law," App. 19a (the standard relevant to the judgment below). It is also quite plain from the dissent that the abuse-of-discretion analysis for district court factfinding where evidence has been excluded, described by the majority in dicta, is *not* a new and separate review standard; rather, it is simply a minor aspect of the traditional abuse-of-discretion review standard. *See* App. 18a ("In applying a 'particularly stringent' review, we do not change the threshold of review, but conduct a searching review of the record (i.e., take a 'hard look') while maintaining the proper standard of review.") (quoting App. 4a) (citations omitted).

II. IN ANY EVENT, THE QUESTION IS NOT WORTHY OF REVIEW BECAUSE THE CIRCUITS ARE IN BROAD AGREEMENT ON THE SUBSTANTIVE CONTENT OF EVIDENTIARY ABUSE-OF-DISCRETION REVIEW

As Judge Smith's dissent itself makes obvious enough, there is widespread agreement among the circuits over the appropriate standard of review in cases involving expert testimony, and nothing contained in the majority decision is out of step with settled law. Thus, even if the two sentences seized on by petitioners were somehow relevant to the judgment below — despite Joiner's reliance in his Rule 702 argument on the *de novo* review standard and the Eleventh Circuit's acceptance of Joiner's Rule 702 argument — there would still be no reason to grant review. The petition addresses only minor differences in use of terminology that are of no substantive importance, as a brief review of the caselaw reveals.

Notably absent from petitioners' review of how the circuits are supposedly "completely split" over whether to use a "manifestly erroneous" review standard or an "abuse of discretion" review standard, *see* Pet. at 6-11, is any discussion of federal appellate cases addressing whether there is any practical difference between the two standards. In fact, several circuits, in decisions studiously

ignored by petitioners, have addressed exactly this point. In *United States v. Rahm*, 993 F.2d 1405 (9th Cir. 1993), for example, the Ninth Circuit explained:

> We have sometimes described our standard of review in the area of expert testimony as "abuse of discretion" and sometimes as "manifest error." On occasion, we have used both characterizations.
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> We note that general adoption of the "abuse of discretion" characterization would bring this area into line with the rest of our law of evidence. . . . The "manifest error" characterization apparently emanates from a Supreme Court decision preceding the judiciary's efforts to settle on a limited number of review characterizations. *See Salem v. United States Lines Co.*, 370 U.S. 31, 35 (1962). There appears to be no practical difference between the two verbal formulae, so their vestigial co-existence serves no obvious purpose. Accordingly, it would be sensible to settle upon a uniform practice of characterizing our standard of review as "abuse of discretion" and abiding by it in all future cases . . . although for purposes of this opinion, it makes no difference which of the two terms — "abuse of discretion" or "manifest error" — we use.

Id. at 1409-10 (citations omitted). Likewise, in *Phillips Oil Co. v. OKC Corp.*, 812 F.2d 265, 280 & n.32 (5th Cir.), *cert. denied*, 484 U.S. 851 (1987), the Fifth Circuit noted that some of its cases had used the "manifestly erroneous" language for review of Rule 702 factfinding and some had used "abuse of discretion" language, but that "[w]e construe these various statements of the standard of review to be harmonious." *See also United States v. Boney*, 977 F.2d 624, 628 n.2 (D.C. Cir. 1992) (the two standards amount to "the same test").

Indeed, as the following survey of representative cases shows, all circuits, including the supposedly "extreme" Third and Eleventh Circuits, Pet. at 6 (whose doctrine petitioners typecast on the basis of only two decisions), apply the same standard when reviewing a district court's decision on the admission of expert testimony, using

the descriptions "abuse of discretion" and "manifestly erroneous" interchangeably — indeed, often together.

First Circuit — *United States v. Cartagena-Carrasquillo*, 70 F.3d 706, 710, 712 (1st Cir. 1995) (noting that decision to exclude expert testimony is "entitled to great deference," and holding that "[t]here was no abuse of discretion in excluding the testimony"); *United States v. Sepulveda*, 15 F.3d 1161, 1183 (1st Cir. 1993) ("a trial judge's rulings in this sphere should be upheld 'unless manifestly erroneous'") (quoting *Salem v. United States Lines Co.*, 370 U.S. 31, 35 (1962), *cert. denied*, 114 S. Ct. 2714 (1994)).

Second Circuit — *In re Air Disaster at Lockerbie Scotland on December 21, 1988*, 37 F.3d 804, 824 (2d Cir. 1994) ("trial court did not abuse its discretion in excluding the testimony of defense experts"), *cert. denied*, 115 S. Ct. 934 (1995); *United States v. Onumonu*, 967 F.2d 782, 786 (2d Cir. 1992) ("a district court's decision to exclude expert testimony is to be reviewed under the abuse-of- discretion standard. Therefore, we may reverse . . . if we conclude that the trial court's decision is 'manifestly erroneous'") (quotes and citations omitted).

Third Circuit — *Government of Virgin Islands v. Sanes*, 57 F.3d 338, 341 (3d Cir. 1995) ("district court did not abuse its discretion in excluding" expert testimony); *Marco v. Accent Publishing Co., Inc.*, 969 F.2d 1547, 1552-53 (3d Cir. 1992) ("trial court has broad discretion over whether to admit or exclude expert testimony"); *United States v. Agnes*, 753 F.2d 299, 303 (3d Cir. 1985) ("district court has broad discretion to exclude expert testimony," and its decisions "will be sustained unless they are manifestly erroneous").

Fourth Circuit — *United States v. Powers*, 59 F.3d 1460, 1471 (4th Cir. 1995) ("We review the district court's refusal to admit scientific evidence for abuse of discretion"); *United States v. Grandison*, 780 F.2d 425, 433 (4th Cir. 1985) ("exclusion of expert evidence . . . is to be sustained unless manifestly erroneous") (quoting *Salem*).

Fifth Circuit — *Eiland v. Westinghouse Elec. Corp.*, 58 F.3d 176, 180 (5th Cir. 1995) ("exclusion of expert testimony is a matter left to the discretion of the trial court, and that decision will not be disturbed on appeal unless it is manifestly erroneous"); *Rosado v. Deters*, 5 F.3d 119, 124 (5th Cir. 1993) (stating that district court's ruling "must be sustained unless manifestly erroneous," and then "find[ing] no abuse of discretion" in refusal to admit expert testimony).

Sixth Circuit — *American & Foreign Ins. Co. v. General Elec. Co.*, 45 F.3d 135, 137 (6th Cir. 1995) (trial court "has broad discretion in the matter of the admission or exclusion of expert evidence, and [its] action is to be sustained unless manifestly erroneous") (quoting *Salem*); *Mayhew v. Bell S.S. Co.*, 917 F.2d 961, 962 (6th Cir. 1990) ("we will sustain the [district court's] action unless it is manifestly erroneous. Thus, we review for an abuse of discretion") (citation omitted).

Seventh Circuit — *Deimer v. Cincinnati Sub-Zero Products, Inc.*, 58 F.3d 341, 344 (7th Cir. 1995) (stating that district court's decision "is to be sustained on appeal unless manifestly erroneous," then holding that "we certainly cannot say that the district court abused its discretion" in excluding expert testimony) (quotation and citation omitted); *Mercado v. Ahmed*, 974 F.2d 863, 871 (7th Cir. 1992) ("we review a district court's decision to exclude expert testimony under an abuse of discretion standard" and "the trial court's determination will be affirmed unless it is 'manifestly erroneous'") (quotations omitted).

Eighth Circuit — *United States v. Van Dyke*, 14 F.3d 415, 422 (8th Cir. 1994) (district court's "decision to exclude expert testimony is accorded broad discretion, and will be upheld unless it is manifestly erroneous"); *United States v. Cantrell*, 999 F.2d 1290, 1292 (8th Cir. 1993) ("A district court has broad discretion to admit or exclude expert testimony, and we will sustain that decision unless it was 'manifestly erroneous'") (quoting *Salem*), *cert. denied*, 114 S. Ct. 885 (1994).

Ninth Circuit — *United States v. Quintero*, 21 F.3d 885, 893 (9th Cir. 1994) ("We review the district court's decision to exclude expert testimony only for manifest error or abuse of discretion"; "there is 'no practical difference' between the two standards") (quoting *Rahm*, *supra*, 993 F.2d at 1410).

Tenth Circuit — *Getter v. Wal-Mart Stores, Inc.*, 66 F.3d 1119, 1124 (10th Cir. 1995), *cert. denied*, 116 S. Ct. 1017 (1996) (affirming ruling excluding expert testimony that "was neither manifestly erroneous nor an abuse of discretion"); *Werth v. Makita Elec. Works, Ltd.*, 950 F.2d 643, 647 (10th Cir. 1991) (trial court's ruling "will not be overturned unless it is manifestly erroneous or an abuse of discretion").

Eleventh Circuit — *Hibiscus Assoc. v. Bd. of Trustees*, 50 F.3d 909, 917 (11th Cir. 1995) (trial court has "broad discretion to exclude expert testimony, and his action will be upheld unless it is manifestly erroneous"); *Evans v. Mathis Funeral Home, Inc.*, 996 F.2d 266, 268 (11th Cir. 1993) (same); *Adams v. Sewell*, 946 F.2d 757, 768 (11th Cir. 1991) ("The district court is afforded great discretion in ruling on the admissibility of expert testimony, and we will reverse only for a clear abuse of that discretion").

D.C. Circuit — The D.C. Circuit describes the standard of review as "abuse of discretion." *United States v. Boney*, *supra*, 977 F.2d 624 at 628; *Joy v. Bell Helicopter Textron, Inc.*, 999 F.2d 549, 567 (D.C. Cir. 1993). However, the court has acknowledged that "[o]ther circuits have stated that a district court's admission of expert testimony will be overturned only if manifestly erroneous," and that "[w]e understand these circuits to be applying the same test that we apply here." *Boney*, 977 F.2d at 628 n.2.

Federal Circuit — *General Electro Music Corp. v. Samick Music Corp.*, 19 F.3d 1405, 1409 n.2 (Fed. Cir. 1994) ("decision to allow expert testimony is within the discretion of the trial court and will not be disturbed absent an abuse of such discretion"); *Milmark Servs., Inc. v. United States*, 731 F.2d 855, 860 (Fed. Cir. 1984) ("Since the admissibility of expert testimony is within the discretion of the trial judge, this action is to be sustained unless manifestly erroneous.").

Thus, all circuits employ the "abuse of discretion" standard for review of district court decisions regarding expert testimony, sometimes referring to it using the older, "manifestly erroneous" language. Further, there appears to be unanimity that the differences are *only* ones of terminology and not of substance; we have located no decisions suggesting that there is any practical difference in the review that is conducted under these two labels. Nor have petitioners found any such decisions. They cite only one case in support of their argument that "[t]he issue . . . 'is important.'" Pet. at 13 (quoting *Mars v. United States*, 25 F.3d 1383, 1384 (7th Cir. 1994)). But the *Mars* decision is talking about a *different* issue. *Mars* offered some tentative observations about whether *de novo* review might apply where "the reliability of an entire *class* of scientific evidence depends on considerations that transcend the individual case," for example, expert testimony involving polygraph machines. *Id.* at 1384. That does seem like an important issue, and in *Mars* Chief Judge Posner was able to cite appellate court holdings on the issue going both ways (something sorely lacking in the petition). But this issue has nothing to do with the question in the petition.

Thus, all that petitioners are left with is their criticism of a short discussion of the abuse-of-discretion standard (two pages out of an 80-page decision) in the Third Circuit's decision two years ago in *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 749-50 (3d Cir. 1994), *cert. denied*, 115 S. Ct. 1253 (1995). Petitioners claim that this *Paoli* discussion, cited by the court of appeals below, is "extreme" and represents "quite a different standard of review" than that followed in all other circuits. Pet. at 6, 10.

The *Paoli* analysis of the nature of abuse-of-discretion review is in no way extreme. "There are a half dozen different definitions of 'abuse of discretion,'" which serves as "'a verbal coat of . . . many colors.'" Friendly, *supra*, 31 Emory L.J. at 763 (quoting *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 39 (1952) (Frankfurter, J., dissenting)). As Judge Friendly explained in his seminal article on the subject,

> The justifications for committing decisions to the discretion of the trial court are not uniform, and may vary with the specific types of decisions. Although the standard of review in such instances is generally framed as 'abuse of discretion,' in fact the scope of review will be directly related to the reason why that category or type of decision is committed to the trial court's discretion in the first instance.

Id. at 764. *See, e.g., id.* at 760-61, 773-84. The *Paoli* decision simply applied this commonsense observation, about the contextual variations in the application of abuse-of-discretion review, to the particular context of district court factfinding on the admissibility of expert testimony. In so doing, the *Paoli* court articulated several reasons for closer scrutiny of at least some factfinding in this context. *See* 35 F.3d at 749-50. The concerns laid out in *Paoli* are ones that are unavoidably at play in appellate decisionmaking under the abuse-of-discretion review standard, but that often go unstated. The fact that the author of the *Paoli* decision would address them briefly in his lengthy and quite scholarly opinion is hardly surprising or extreme.

In any event, the *Paoli* commentary on the standard of review, which did not warrant a grant of certiorari two years ago, appears to have no doctrinal importance at this point in time. In *Paoli* itself, it is unclear whether this analysis had any concrete effect on the court's holdings, given that the Third Circuit ultimately went on to affirm the bulk of the district court's rulings. *See* 35 F.3d at 733-34, 752-95. Even in the Third Circuit, the *Paoli* analysis of the standard of review has not been cited since; instead, in every subsequent decision addressing evidentiary rulings the Third Circuit has simply stated that it reviews for abuse of discretion.[1]

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[1] *See Coalition v. State Bd. of Educ. of the State of Delaware*, 90 F.3d 752, 759 (3d Cir. 1996); *Duquesne Light Co. v. Westinghouse Elec. Corp.*, 66 F.3d 604, 613 (3d Cir. 1995); *United States v. Velasquez*, 64 F.3d 844, 847-48 (3d Cir. 1995); *Sanes, supra*, 57 F.3d at 340-41; *Affiliated Mfrs., Inc. v. Alcoa*, 56 F.3d 521, 525-26 (3d Cir. 1995); *United States v. Brink*, 39 F.3d 419, 427 (3d Cir. 1994); *Habecker v. Clark Equip. Co.*, 36 F.3d 278, 289-90 (3d Cir. 1994), *cert. denied*, 115 S. Ct. 1313 (1995).

Likewise, since the brief mention of *Paoli* in the decision below, the Eleventh Circuit has ignored the point and has simply engaged in abuse-of-discretion review, without special elaboration. *See Harris v. Chapman*, 1996 U.S. App. LEXIS 26607, at *13 (11th Cir. Oct. 11, 1996) ("We review the district court's evidentiary rulings for abuse of discretion."); *United States v. Paradies*, 1996 U.S. App. LEXIS 24902, at *70-*71 (11th Cir. Sept. 23, 1996) ("The district court's exclusion of expert testimony is subject to an abuse of discretion standard"). Nor has any other circuit addressed the *Paoli* analysis in a case where the issue of the standard of review would make any conceivable difference to the outcome.[2]

Thus, a review of the existing caselaw on the standard of review for district court evidentiary factfinding reveals that all the circuits are in broad agreement. The "abuse of discretion" standard, sometimes called the "manifestly erroneous" standard, applies everywhere, even in the Third Circuit and the Eleventh Circuit. The two pages of *Paoli* that are emphasized by petitioners have not been relied on to support a holding in *any* subsequent federal

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[2] In a supplemental brief, petitioners have emphasized the decision of the Tenth Circuit in *Duffee v. Murray Ohio Mfg. Co.*, 91 F.3d 1410 (10th Cir. 1996). However, *Dufee*'s discussion of the *Paoli* analysis, like the mention of *Paoli* in the decision of the Eleventh Circuit in this case, is plainly dicta because on the record in that case the district court would have been affirmed regardless of the standard of review. *See Duffee v. Murray Ohio Mfg. Co.*, 879 F. Supp. 1078, 1081, 1086 (D. Kan. 1995) (expert "did not use a methodology comparable to that used by a bicycle designer in arriving at his conclusion that the particular bicycle was defectively designed in having only a rear coaster brake system"; indeed, the expert "practically conceded that he had reached his opinion without tracking the methodology or analysis that would be employed by a reasonable bicycle manufacturer or designer."). In failing to apply the *Paoli* analysis of abuse-of-discretion review, *Duffee* is no different than the seven Third Circuit decisions on this issue since *Paoli*, and the two Eleventh Circuit decisions on this issue since the decision below. See pp. 14-15 & n.1, *supra*. Since neither of the Seventh Circuit decisions cited by the Tenth Circuit addressed the *Paoli* analysis, either, *see* 91 F.3d at 1411, *Duffee* simply provides a further illustration of the fact the *Paoli* analysis is currently of no doctrinal significance and has been effectively ignored both inside and outside the Third Circuit.

appellate decision, either inside or outside the Third Circuit. Indeed, this aspect of *Paoli* has not even been mentioned in the Third Circuit. It was mentioned in the decision below rendered six months ago, but only as an aside that made no difference to the judgment rendered. Since then, the *Paoli* analysis has been ignored in the Eleventh Circuit. Thus, even if one were to set aside the fact that the judgment below was rendered entirely on *de novo* review, there would still be no convincing rationale for granting certiorari to address the correctness of the two sentences in the Eleventh Circuit's opinion that are the basis of the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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